

HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA, INC., et al.,

Defendants.

No. C10-1823-JLR

MICROSOFT'S 8/27/12 MOTION TO
FILE DOCUMENTS UNDER SEAL

NOTED FOR:
Friday, September 7, 2012

MOTOROLA MOBILITY, INC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

I. RELIEF REQUESTED

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order entered in this case, Microsoft respectfully seeks leave to file under seal the following documents:

- (1) Limited Portions of Microsoft's Rule 702 Motion to Preclude Testimony by Charles R. Donohoe and Dr. R. Sukumar (Microsoft's "*Daubert* Motion"); and
- (2) Exhibits 1-3 and 5 to the Declaration of Christopher Wion in Support of Microsoft's Rule 702 Motion to Preclude Testimony by Charles R. Donohoe and Dr. R. Sukumar (the "8/27/12 Wion Declaration").

MICROSOFT'S 8/27/12 MOTION TO FILE
DOCUMENTS UNDER SEAL - 1

No. C10-1823

LAW OFFICES
CALFO HARRIGAN LEYH & EAKES LLP
999 THIRD AVENUE, SUITE 4400
SEATTLE, WASHINGTON 98104
TEL. (206) 623-1700 FAX. (206) 623-8717

1 Microsoft seeks to file the foregoing materials under seal because they contain
 2 information that has been identified by either Microsoft or Motorola as confidential business
 3 information under the terms of the operative protective order issued in this case.

4 For these reasons, and as more fully described below, good cause exists for protecting
 5 the confidentiality of these documents. Microsoft respectfully requests permission to file the
 6 above-referenced documents under seal and that the Court direct such documents to remain
 7 under seal. Microsoft is filing a redacted version of its *Daubert* Motion as part of the public
 8 record.

9 II. FACTS & AUTHORITY

10 A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to 11 File Confidential Information under Seal.

12 Pursuant to the Protective Order issued by the Court on July 21, 2011, Microsoft is
 13 permitted to file materials designated by either party as Confidential Business Information¹
 14 under seal, with such documents to remain under seal upon Court approval. Paragraphs 2(a)
 15 and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a)
 16 provides:

17 Any information submitted in pre-trial discovery or in a pleading, motion, or
 18 response to a motion in this action, either voluntarily or pursuant to order, and
 19 which is asserted by a supplier to contain or constitute Confidential Business
 20 Information shall be so designated by such supplier in writing...and shall be
 21 segregated from other information being submitted. Documents shall be clearly
 22 and prominently marked on their face with the legend: "[SUPPLIER'S NAME]
 23 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO
 24 PROTECTIVE ORDER" or a comparable notice. During the pre-trial phase of
 25 this action, such information, whether submitted in writing or in oral testimony,
 shall be disclosed only *in camera* before the Court and shall be filed only under

23
 24 ¹ "Confidential Business Information" is defined in the parties' Protective Order as "information which has not
 25 been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or
 apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories,
 amounts or source of any income, profits, losses, or expenditures." Protective Order Regarding the Disclosure
 and Use of Discovery Materials (ECF No. 72), ¶1.

1 seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District
 2 Court for the Western District of Washington.

3 Paragraph 8 likewise provides that:

4 Any Confidential Business Information submitted to the Court in connection
 5 with a motion or other proceeding within the purview of this action shall be
 6 submitted under seal pursuant to paragraph 2 above.

7 *Id.*, at ¶ 8.

8 The Federal Rules of Civil Procedure recognize that courts may permit parties to file
 9 “trade secrets or other confidential research, development, or commercial information” under
 10 seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly
 11 competing needs and interests of the parties affected by discovery,” in crafting the appropriate
 12 treatment of documents for which protected treatment is requested. *Seattle Times Co. v.*
Rhinehart, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*,
 13 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

14 Additionally, pursuant to Local Rule CR 5(g)(2), the Court may seal a document filed in
 15 support of a non-dispositive motion upon a showing of good cause. Where the material sought to
 16 be sealed “includes information about proprietary business operations, a company’s business
 17 model or agreements with clients, there are compelling reasons to seal the material because
 18 possible infringement of trade secrets outweighs the general public interest in understanding
 19 the judicial process.” *Selling Source, LLC*, 2011 U.S. Dist. LEXIS 49664, at *18.

20 Further, while the public generally enjoys a right to inspect and copy public records, “it
 21 is uncontested ... that the right to inspect and copy judicial records is not absolute. Every court
 22 has supervisory power over its own records and files, and access has been denied where court
 23 files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court recognized, one such “improper
 24 purpose” is where the commercial business information at issue is sought to be used as a
 25 “source[] of business information that might harm a litigant’s competitive standing.” *Id.*

1 (denying access to copies of tapes played at trial and noting that courts refused public access to
 2 their files where granting such access might “become a vehicle for improper purposes,”
 3 including causing a litigant competitive harm). Good cause exists to grant Microsoft’s motion
 4 to seal.

5 **B. Good Cause Exists for Maintaining under Seal Documents that Disclose Non-**
Public and Commercially Sensitive Information.

6 1. The Above-Referenced Exhibits to the 8/27/12 Wion Declaration Should Remain
Filed under Seal

7 Exhibit 1 to the 8/27/12 Wion Declaration is a copy of the transcript from the August
 8 22, 2012 deposition of Motorola’s expert, Richard Schmalensee. At his deposition, Mr.
 9 Schmalensee testified extensively regarding the content of both his opening and rebuttal expert
 10 reports, which were both designated by Motorola as “Highly Confidential – Attorneys’ Eyes
 11 Only” under the terms of the Protective Order. Mr. Schmalensee was also examined regarding
 12 the substance of the opening report submitted by another Motorola expert, Charles R. Donohoe
 13 (discussed below). Both Mr. Schmalensee’s testimony and the expert reports referenced
 14 extensively throughout the course of his deposition disclose confidential and non-public
 15 financial and business information relating to both Microsoft and Motorola, including as it
 16 relates to their confidential licensing arrangements with third parties.

17 Exhibit 2 to the 8/27/12 Wion Declaration is a copy of the July 24, 2012 opening report
 18 of Motorola’s expert, Charles R. Donohoe. Motorola has affixed the following label to Mr.
 19 Donohoe’s opening expert report: “Contains Confidential Financial Information – Outside
 20 Attorneys’ Eyes Only – Subject to Protective Order.” Mr. Donohoe’s report includes an
 21 examination of, and discloses, confidential and non-public financial and business information
 22 relating to both Microsoft and Motorola, including as it relates to their confidential licensing
 23 arrangements with third parties.

1 Exhibit 3 to the 8/27/12 Wion Declaration is a copy of the transcript from the August
 2 24, 2012 deposition of Mr. Donohoe. The deposition transcript has been designated as "Highly
 3 Confidential – Pursuant to Protective Order." At his deposition, Mr. Donohoe testified
 4 extensively regarding the content of both his opening and rebuttal expert reports, both of which
 5 were designated as containing confidential information subject to the terms of the Protective
 6 Order. Both Mr. Donohoe's testimony and the expert reports referenced extensively
 7 throughout the course of his deposition disclose confidential and non-public financial and
 8 business information relating to both Microsoft and Motorola, including as it relates to their
 9 confidential licensing arrangements with third parties.

10 Exhibit 5 to the 8/27/12 Wion Declaration consists of excerpts from the August 21,
 11 2012 deposition of Motorola's expert, Timothy Drabik. The transcript has been designated as
 12 "Confidential Business Information Subject to the Protective Order." Mr. Drabik's deposition
 13 testimony describes technical aspects of Microsoft's products that are not generally known to
 14 the public and the disclosure of which would serve no legitimate public purpose.

15 Public disclosure of the confidential business information contained in the foregoing
 16 Exhibits would create an unreasonable risk of commercial harm to Microsoft (and Motorola)
 17 without any legitimate countervailing benefit to the public. Based on the foregoing, good
 18 cause exists to maintain the Exhibits under seal.

19 2. Microsoft's Daubert Motion Includes References to Confidential
 20 Information Contained in the Above-Referenced Exhibits, which Should Be
Redacted

21 Microsoft's *Daubert* Motion includes references to and descriptions of the confidential
 22 information contained in the above-referenced exhibits to the 8/27/12 Wion Declaration. To
 23 the extent that the Court determines that those exhibits should remain filed under seal,
 24 Microsoft's *Daubert* Motion should be redacted to avoid disclosure of the confidential
 25 information contained in those exhibits. Microsoft is seeking to file under seal only those

1 limited portions of its *Daubert* Motion that contain information that should be protected from
2 public disclosure under the governing standards outlined above. While a complete and
3 unredacted version of the *Daubert* Motion is being filed under seal, Microsoft is filing a
4 redacted version as part of the public record.

5 **III. CONCLUSION**

6 Microsoft has filed the above-referenced documents under seal based on its good faith
7 belief that such material qualifies for protection under the terms of the Protective Order and the
8 applicable Court rules. A [Proposed] Order Granting Microsoft's 8/27/12 Motion to File
9 Documents Under Seal has been submitted herewith.

10 DATED this 27th day of August, 2012.

11 CALFO HARRIGAN LEYH & EAKES LLP

12
13 By s/ Arthur W. Harrigan, Jr.
14 Arthur W. Harrigan, Jr., WSBA #1751
15 Christopher Wion, WSBA #33207
16 Shane P. Cramer, WSBA #35099

17 By T. Andrew Culbert
18 T. Andrew Culbert
19 David E. Killough
20 MICROSOFT CORPORATION
21 1 Microsoft Way
22 Redmond, WA 98052
23 Phone: 425-882-8080
24 Fax: 425-869-1327

25 David T. Pritikin
26 Richard A. Cederoth
27 Constantine L. Trela, Jr.
28 William H. Baumgartner, Jr.
29 Ellen S. Robbins
30 Douglas I. Lewis
31 David C. Giardina
32 John W. McBride
33 David Greenfield

1 SIDLEY AUSTIN LLP
2 One South Dearborn
3 Chicago, IL 60603
4 Phone: 312-853-7000
5 Fax: 312-853-7036

6 Carter G. Phillips
7 Brian R. Nester

8 SIDLEY AUSTIN LLP
9 1501 K Street NW
10 Washington, DC 20005
11 Telephone: 202-736-8000
12 Fax: 202-736-8711

13 Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
 2. On the 27th day of August, 2012, I caused the preceding document to be served

on counsel of record in the following manner:

Attorneys for Motorola Solutions, Inc., and Motorola Mobility, Inc.:

Ralph Palumbo, WSBA #04751
Philip S. McCune, WSBA #21081
Lynn M. Engel, WSBA #21934
Summit Law Group
315 Fifth Ave. South, Suite 1000
Seattle, WA 98104-2682
Telephone: 206-676-7000
Email: Summit1823@summitlaw.com

Messenger
 US Mail
 Facsimile
 ECF

Steven Pepe (*pro hac vice*)
Jesse J. Jenner (*pro hac vice*)
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036-8704
Telephone: (212) 596-9046
Email: steven.pepe@ropesgray.com
Email: jesse.jenner@ropesgray.com

Messenger
 US Mail
 Facsimile
 ECF

Norman H. Beamer (*pro hac vice*)
Ropes & Gray LLP
1900 University Avenue, 6th Floor
East Palo Alto, CA 94303-2284
Telephone: (650) 617-4030
Email: norman.beamer@ropesgray.com

Messenger
 US Mail
 Facsimile
X ECF

1 Paul M. Schoenhard (*pro hac vice*)
Ropes & Gray LLP
2 One Metro Center
700 12th Street NW, Suite 900
Washington, DC 20005-3948
3 Telephone: (202) 508-4693
4 Email: Paul.schoenhard@ropesgray.com

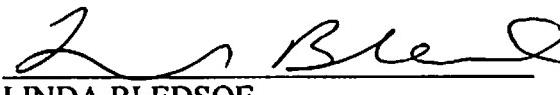
Messenger

US Mail

Facsimile

ECF

5 DATED this 27th day of August, 2012.
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LINDA BLEDSOE

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MICROSOFT'S 8/27/12 MOTION TO FILE
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LAW OFFICES
CALFO HARRIGAN LEYH & EAKES LLP
999 THIRD AVENUE, SUITE 4400
SEATTLE, WASHINGTON 98104
TEL. (206) 623-1700 FAX. (206) 623-8717